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RICHARD CHRISTOPHER, EDITOR
312/793-4838 PHONE
312/793-4974 FAX
E-MAIL ChristopherRA@nt.dot.state.il.us

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WHITE HOUSE ISSUES EXECUTIVE ORDER ON STREAMLINING AND STEWARDSHIP

On September 18, 2002 the President issued an Executive Order "to enhance environmental stewardship and streamline the environmental review and development of transportation infrastructure projects…" The Order directs each agency of the Federal government to adopt policies which ensure completion of reviews for transportation projects in a timely manner. USDOT is directed to advance environmental stewardship in the planning, development, operation, and maintenance of transportation facilities and services. Reviews are supposed to be even faster for projects that USDOT says are high priority. A task force of Federal agencies is created to monitor streamlining efforts and make recommendations for change. It remains to be seen whether this new E.O takes the push for substantive changes in the laws which slow down the process off the Congressional agenda. The text of the Order is available at *http://www.whitehouse.gov*.

SMALL BUSINESS LIABILITY RELIEF AND BROWNFIELDS REVITALIZATION ACT – A BRIEF ANALYSIS

Submitted by J. Randle Schick
Assistant Chief Counsel, Illinois Dept. of Transportation
217/782-3215

This Act was signed into law by President Bush on January 11, 2002. (It can be downloaded from U.S. EPA's website on its Brownfields Economic Redevelopment Initiative page.) Some understanding of CERCLA liability is necessary to understand the significance of the changes wrought by this Act. For the sake of brevity and sacrificing the nuances, a person is liable under CERCLA for costs for responding to hazardous substances when that person owns or acquires property where there has been a release of those substances or has disposed of them and they have been released into the

environment. This law creates some new defenses to that liability and attempts to clarify others. It is helpful to transportation agencies, but due to the many conditions, exclusions and qualifiers it falls far short of being a panacea.

Two new defenses are created in the Act under a section called "Small Business Liability Relief." The first is a small quantity, less than 110 gallons (2 drums) of liquid or 200 pounds of solid waste containing hazardous substances, exemption from CERCLA liability. However, this defense is only available at NPL sites and for disposals prior to April 1, 2001. There can also be other exceptions to this exemption, but this is easily the simplest defense to qualify for.

The second new defense is called the "Municipal Solid Waste Exemption." Only certain businesses and organizations are eligible, and States and local governments do not appear to qualify. In any event, private contribution actions under CERCLA cannot be brought against the State under the Seminole Indian case. The definition of "Municipal Solid Waste" will make it impossible in most cases to prove whether something is or is not municipal solid waste. The burden of proof at NPL sites appears to be on the party claiming that your waste is not. (You really have to read Section 102(p)(5) on burden of proof to believe it.)

Under what the Act describes in Orwellian fashion as "Brownfields Liability Clarifications," new defenses (?) have also been created. If a person owning property contiguous to a site (not necessarily an NPL site) contaminated with hazardous substances can meet the eight (yes, eight!) conditions described in Section 221, that person will not be considered as, what is known in the parlance, an "owner/operator" for CERCLA liability. The burden of proof, you guessed it, is on the person claiming this defense. What was it Will Rogers said about Congress? They have clarified this defense to death, literally.

One important limiting condition on this defense is that you had to have made an appropriate inquiry and still had no reason to believe the property was contaminated. However, for those who did so and discovered the contaminants and bought the property anyway, Congress wasn't through. It created what it likes to call the "Bona Fide Prospective Purchaser" defense for them. Not only does that person also have to meet eight conditions, but is also subject to what Congress lovingly refers to as a "Windfall Lien." In brief, the United States can have a lien on the value of the property enhanced by an EPA cleanup of the property.

Don't get me started on what Congress has done to clarify the old "Innocent Landowner" defense. It has specified what it meant by "appropriate inquiries" with ten criteria, and divided criteria by before and after May 31, 1997, the date ASTM's standard for site assessments was published. And, be afraid, U.S. EPA is supposed to adopt rules to further define "appropriate inquiry."

In closing, Congress has only dealt with CERCLA liability here. It has not touched RCRA liability, including liability related to petroleum contamination (petroleum is excluded from CERCLA). Petroleum contamination is far and away the number one contaminant transportation agencies encounter in the right-of-way. So, be careful. None of this is going to help avoid "imminent threat" liability under RCRA or trespass liability under common law. But thanks anyway Congress for the new defenses and

clarifications. This is probably the best we could expect given members with sharply differing views on Superfund liability.

SEVENTH CIRCUIT UPHOLDS FHWA 4F DETERMINATION

Submitted by Ron Moses
Assistant Chief Counsel, FHWA
708/283-3559
Ronald.Moses@fhwa.dot.gov

This was an appeal from the Southern District of Wisconsin. The plaintiffs challenged the rehabilitation of 5.9 miles of Highway 131 through the Kickapoo Reserve in southwestern Wisconsin. Plaintiffs argued that FHWA did not adequately consider alternatives, violated the Water Resources Development Act (WRDA) of 1996 (part of which directs that the Kickapoo Reserve "…be preserved in a natural state and developed only to the extent necessary to enhance outdoor recreational and educational opportunities"), and 4f. FHWA prevailed on all counts. The court noted that part of the WRDA compelled completion of Rte. 131, and that the alternatives analysis was adequate.

Of interest is the 4f decision. We determined that the Kickapoo Reserve was not 4f, despite the language in the WRDA quoted above, which transferred the Reserve to the State. The issue arose as to whether this formally declared the Reserve as recreational land for 4f purposes. Plaintiffs pointed out that the Department of the Interior letter recommended that the Reserve be classified as 4f. However, the Joint Management Plan that governs the administration of the Reserve states that it is designed to "protect the…aesthetic, cultural, scenic and wild qualities" as well as "utilize sound natural resources and agricultural management practices." There are additional references to forestry and agriculture elsewhere in the plan. Route 131 also passes through a part of the Wild Cat Mountain State Park, which we did, of course, recognize as 4f. It is not possible on examination of this area to tell the difference between the Park and the Reserve, although I did see some corn growing in the Reserve.

The Court stated that "Section 4f only applies to those lands *formally* classified as parks, recreation areas, wildlife and waterfowl refuges or historic sites," (emphasis supplied) and that "it is the DOT, and not the Interior Department, that makes the 4f determination," and that neither the DOI letter nor the WRDA was sufficient to designate the Reserve as 4f land. The court found that there was no showing that it was arbitrary and capricious for the DOT to decide that the Reserve was not 4f. FHWA made such decision based on the multiple uses of the Reserve, and on lack of formal designation as a type of property protected by 4f. *Kickapoo Valley Stewardship Association v. USDOT, et al.,* No. 01 C 214 S, June 20, 2002

FAA NOISE RULE ON GRAND CANYON OVERFLIGHTS STRUCK DOWN

FAA promulgated a rule which limited the number of air tours which could fly over the Grand Canyon. The rule was challenged by the air tour operators for being too strict and by the Grand Canyon Trust, a coalition of environmental groups, for being too liberal. The latest FAA rule essentially capped the number of flights for each tour operator at the

number it operated during the base year of May 1, 1997 to April 30, 1998. The rule followed the issuance of criteria by the National Park Service (NPS).

The air tour operators challenged the NPS methodology because it had changed from an earlier version and challenged the way FAA had run its noise model. Neither challenge was accepted by the Court. The Trust challenged FAA's interpretation of the NPS criteria document and FAA's decision to limit its analysis to the noise from the air tour operators and not consider other aircraft noise. Both of the Trust's challenges were accepted.

The change in interpretation shifted from measuring noise on an average daily basis to an average annual basis. The Court did not allow FAA's interpretation to stand even though NPS was represented by FAA's counsel from the Justice Department. FAA excluded the other aircraft because it believed that the minimal amount of noise they contributed would not significantly affect the outcome. The Court held that the record evidence suggested otherwise. *United States Air Tour Association, et al. v. FAA, et al.,* D.C. Circuit No. 00-1201 & 00-1212, August 16, 2002. The opinion is available at http://pacer.cadc.uscourts.gov

FAA APPROVAL OF CLEVELAND AIRPORT OVERHAUL UPHELD

In order to remedy operational deficiencies at Cleveland, Ohio's Hopkins International Airport, FAA approved the relocation of one runway and the shifting and extending of a parallel runway. A neighboring community sued claiming that FAA had underestimated NOX emissions in its general conformity analysis, had failed to disclose a violation of the Clean Water Act, and had not recognized degradation of a creek as a "use" of parkland under Section 4f.

The Court held that the community had standing to protect its economic interests based on adverse environmental impacts. This was a close call. The community was not allowed to claim that the emissions from a number of construction projects should have been included in the conformity analysis because it did not raise the issue when the DEIS was published. Even if the challenge had been allowed, the community's claims would not have upset FAA's determination that the emissions were below the *de minimis* level for analysis. FAA's forecast of future operations and whether these operations would occur with or without the airport improvement was given deference by the Court. The community's claim of a water quality violation was really a collateral attack on Ohio EPA's decision to grant a waiver of certification under Section 401 of the Clean Water Act. Whether or not Ohio EPA had the authority to grant a waiver was beyond the Federal court's domain. The community's allegations of "use" under Section 4f by virtue of instream work were not allowed because they were not raised during the comment period on the DEIS. Since all of the challenges were denied, there was no need for a supplemental EIS. *City of Olmsted Falls, Ohio v. FAA,* D.C. Circuit No. 00-1548, June 14, 2002. The opinion can be found at http://pacer.cadc.uscourts.gov.

NEW UTAH INTERCHANGE, BRIDGE AND ROAD BASED ON FONSI STOPPED IN 10TH CIRCUIT

FHWA approved a new interchange on I-15, a new five lane road and a new bridge through a park based on an EA and a FONSI. The reviewing court made significant note of the fact that the project schedule, originally prepared by a city and its consultants,

called for an EA and FONSI before there had been public involvement. The Court also noted that a law firm hired to review the EA had criticized the document early on, but the criticisms were ignored. FHWA was implicated in the "rush to judgment" because staff had attended meetings and done nothing to get the project reviewed independently.

As the opinion proceeded downhill, the Court found that the purpose and need was written too narrowly to allow a reasonable range of alternatives. The number of alternatives that received serious consideration was too few because other roads could have been expanded. The alternatives that could have avoided or minimized impacts on the park and the historic structures were not analyzed to any detail. The EA did not contain justification for its conclusion that the area would grow with or without the improvement. (The Court saw no response to EPA's objections on this point.) Additional deficiencies were thrown in for good measure. *Davis, et al. v. Mineta, et al.,* 10th Circuit No. 01-4129, June 20, 2002. The Opinion can be viewed at http://www.ck10.uscourts.gov.

BICYCLIST CANNOT STOP STREET /TRANSIT IMPROVEMENT IN HOUSTON

When the City of Houston and the Harris County Transit Authority proposed to upgrade Louisiana Street in Houston, a local bicyclist complained. He claimed that it would not be safe for him to ride on Louisiana Street anymore. When his complaints were not taken seriously, he sued. The Court had to decide whether judicial review of the Federal government's decision to fund this project had been precluded by Congress. The Court reviewed the Federal statutory language on metropolitan plans which requires that these plans consider certain factors such as safety but which precludes judicial review of plans. The Court reviewed 23 USC 217 (g) which mandates certain consideration for bicyclists and pedestrians but concluded that this section is tied to the planning sections and the overall intent of Congress which preclude review. The Court went on to conclude that there was no implied private right of action for violations of Section 217(g). *Lundeen v. Mineta,* 291 F.3d 300 (5th Cir. 2002)

TEXAS TOWN CANNOT FORCE FAA TO DO EIS ON NEIGHBORING AIRPORT

Although the Town of Fairview, Texas has many complaints concerning the McKinney Municipal Airport (MMA), a reliever 30 miles from DFW, its main complaint is against FAA. Fairview claims that FAA must shut down all improvements at MMA and force the airport to disclose all its expansion plans until an EIS is prepared. The Court found that there was no private right of action to enforce NEPA so it treated Fairview's complaint as though it had been brought pursuant to the APA. The Court found that there was no cause of action under the APA because there was no final agency action. FAA had not made any decision pursuant to NEPA. The case was not ripe for review. *Town of Fairview v. USDOT,* 201 F. Supp. 2d 64 (D.D.C. 2002)

NEW JERSEY CAN CONDEMN PROPERTY AND RESERVE THE RIGHT TO PURSUE CLEANUP COSTS LATER

Like most states New Jersey imposes strict liability for discharges of hazardous substances. There is also immunity for public entities which acquire property after it has been contaminated. New Jersey Transit (NJT) acquired property for a light rail line which had some contamination. When NJT filed for condemnation, it proposed to insert

deed reservations which would allow it to come back later and pursue cleanup costs from the prior owners. The owners fought the reservations because they felt they would prevent them from asserting *res judicata,* collateral estoppel, and entire controversy defenses in the future. NJT appraised the property as though it had not been contaminated. The Court held that the reservation clauses were consistent with the New Jersey law on contaminated property and eminent domain law. The Court saw through the property owners' attempt to enhance their position simply by virtue of their property being taken for a public project. *New Jersey Transit Corporation v. Cat in the Hat, LLC,* 353 N.J. Super 364, 803 A. 2d 114 (2002)

MNDOT MUST ALLOW BILLBOARDS ON MUNICIPALLY OWNED GOLF COURSE

The City of Mounds View, MN built and operated a golf course. The course was intended to be run as a business, but it did not make enough money to pay off its bonds. In order to make more money, the City rezoned a portion of the course to "PF" (public facilities) which was the designation for most publicly owned land in the City. The rest of the course was already PF. The City then entered into a lease with an outdoor advertising company for a series of billboards on the golf course property. MNDOT denied the permits for signs on the basis that the golf course was not a business area and the City's zoning decision was not part of a comprehensive zoning plan. On review the Court noted that the golf course was doing business and was surrounded by industrial property. The zoning designation did not mean as much as the actual use of the property. The Court said that "…the DOT's decision represented its will and not its judgment..." The fact that the City's decision to rezone may have been motivated by a desire to get some billboards up did not make it an invalid decision. *In Re: Eller Media Company's Applications for Outdoor Advertising Device Permits,* 642 N.W.2d 492 (2002)

FHWA APPROVAL AND CORPS PERMIT OVERTURNED FOR UTAH LEGACY PARKWAY

The 10th Circuit issued a very complicated opinion which upheld a great deal of the findings in the FEIS for this project but overturned many others. The Court distinguished between the standards for approval of an EIS under NEPA versus the standards called for under Section 404 of the Clean Water Act. A great many issues that would normally be addressed in the planning process were aired in the EIS and therefore reviewed by the Court. Utah DOT (UDOT) proposed to build a 14 mile divided highway along new alignment near the Great Salt Lake. The road would fill 114 acres of wetlands and connect to the Interstate system. An alternative alignment was rejected based on high cost, but the record did not reflect that the Federal agencies had verified these costs independently. As a result, the rejection of this alignment was reversed. Design features such as median width, connection to a trail system, and the provision for a utility corridor were upheld under NEPA. The stand alone transit alternatives were addressed properly but the blending of transit and highway improvements was not adequately documented. The EIS did not need to consider alternative land use forecasts because land use is a local and regional matter handled by others. Impacts to wildlife were addressed by defining a 1000 foot study area on both sides of the alignment. This was ruled inadequate for impacts to migratory birds. Opponents argued that all related

improvements to I-15 , the transit system, and the Legacy Parkway had to be handled in one EIS. The Court disagreed, noting that the other projects were mentioned and they appeared to stand alone. The Court found that FHWA and the Corps had relied on UDOT too much in preparing the EIS, but the results of the analysis were not "preordained" so the reliance was not enough to find the EIS inadequate. An alternative alignment determined to be infeasible was the correct standard for finding the alternative impracticable under Section 404, but the analysis was insufficient to justify the finding in the EIS. The Court found that the Corps was not justified in finding that a narrower median width was impracticable. Maintaining a utility corridor was not a project purpose so a failure to keep a wide enough corridor to allow for utilities would not be impracticable. *Utahns for Better Transportation, et al v. USDOT, et al.,* 10th Circuit No. 01-4216, 4217, 4220; September 16, 2002. The opinion can be found at http://www.ck10.uscourts.gov.

CHAIR'S CORNER

Submitted by Helen Mountford

Helen_Mountford@compuserve.com

We anticipate an exciting TRB Annual Meeting January 12-16 in Washington, D.C. Our committee, as usual, will be active. We hope to present two sessions-one on legal sufficiency of environmental documents and one on insurance to cover the costs of hazardous materials cleanup costs. The committee will also meet and plan our sessions for the July meeting in New Orleans, but as of this date, I do not have exact dates within the TRB schedule for any of the events. As soon as those become available, I shall send an e-mail to the committee and look forward to seeing many of you in January.

Thanks again to Rich Christopher for putting this newsletter together and to Jim Thiel and John Sobotik at Wisconsin DOT for getting it distributed. Please continue to send your news to Rich.

NEXT COPY DEADLINE IS DECEMBER 16, 2002

Please get your submissions for the January, 2003 *Natural Lawyer* into the Editor by the close of business on December 16, 2002. Please use the e-mail address or FAX number listed at the beginning of the newsletter or mail to Rich Christopher, IDOT, 310 South Michigan, Chicago, IL 60604